IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 23RD OCTOBER 2007 / 1ST KARTHIKA 1929

CRL.A.No. 34 of 2001()

CC.302/1997 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD

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APPELLANT: COMPLAINANT

THYAMAPANNA SHETTY
C/O.BATTU SHETTY
RESIDING AT THIMBARA HOUSE
MANGALAPADY, KASARAGOD DISTRICT.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENTS: ACCUSED & STATE

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1. P.M.MOOSAKUNHI, S/O.MAMMUNHI
   RESIDING AT PERINGADI
   MANGALPADY VILLAGE, UPPALA
   KASARAGOD DISTRICT.

2. STATE OF KERALA REPRESENTED
   BY THE PUBLIC PROSECUTOR
   HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.AMJAD ALI
SRI.M.SASINDRAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.R.UDAYABHANU, J

Crl.A.No.34 of 2001

Dated this the 23rd day of October, 2007

JUDGMENT

The appellant is the complainant who had initiated proceedings under Section 138 of the Negotiable Instruments Act in which the accused happened to be acquitted.

2. It is the case of the appellant/complainant that the accused availed a loan of Rs.50,000/- from the complainant in the first week of January 1997 and issued two cheques dated 14.1.1997 for Rs.25,000/- each towards discharge of the above liability. The cheques when presented got dishonoured for want of funds in the account of the accused. The lawyer notice issued on 23.5.1997 was returned unclaimed.

3. The evidence adduced in the matter consisted of the testimony of PWs' 1 and 2, Exts. P1 to P4 and DWs' 1 and 2.

4. The trial court acquitted the accused on the ground that the complainant has not complied with Section 138(C) and held that the proceedings have been instituted before the expiry

of the 15 days period from the date of starting of the date of cause of action. The execution of the cheque and as to the liability as claimed by the complainant was found to have been established from the evidence produced by him. The only point in disputes was with respect to the compliance of Section 138(C). It was found from the evidence of PW2 the postman that the intimation of the postal article was given to the inmates of the house on 10.6.1997. It was stated that the postal articles would be kept in 7 days from the date of intimation and thereafter returned to the addressee. The court below has calculated the date from 17.6.1997 whereas according to the complainant the period ought to have been calculated from 10.6.1997. The counsel has relied on the decision **Bhaskaran vs. Balan (1999(3) KLT 440(SC)**) in support.

5. I find that the facts in the above reported decision is entirely different and the finding was in favour of the complainant. There is no justification in the instant case to calculate the date from 17.6.1997. The statutory obligation of the complainant is over by tendering the notice and the

intimation of the same were served on 10.6.1997. Further, in view of the recent decision in **Alavi Haji vs. Muhammed (2007 (3) KLT 77 (SC))** the date of the receipt of notice etc. has not much relevance. In view of the findings of the court below that the proceedings have been instituted prematurely cannot be upheld.

6. The court below has held with respect to the case of the complainant as to the borrowal of the amount and as to the execution of the cheque in favour of the complainant. It was specifically found that Exts. P1 and P2 cheques were executed by the accused in discharge of debt.

7. The evidence adduced by the defence through DWs' 1 and 2 of whom DW1 is the accused is hardly sufficient to rebut the statutory presumptions. In fact DW2 has not even denied the suggestion that the accused had borrowed a sum of Rs.50,000/- from the complainant. In the circumstances, I find that the complainant has succeeded to establish the guilt on the part of the accused with respect to the offence under Section 138 of the Negotiable Instruments Act. The accused is convicted for the

offence under Section 138 of the Negotiable Instruments Act and sentenced to imprisonment till the rising of the court and to pay a fine of Rs.50,000/- and in default, to undergo simple imprisonment for three months. The accused shall appear before the court below on 23.11.2007 to receive sentence.

The criminal appeal is disposed of accordingly.

K.R.UDAYABHANU,
JUDGE

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